Supreme Court, U.S.
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In The

Supreme Court of the United States

SYBLE M. VAUGHN & W. T. SUMNER,

Petitioners,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a remand, where the appellate court does not retain jurisdiction, is sufficient to establish "prevailing party" status under the Equal Access to Justice Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra 1-17) is reported at 336 F.3d 1351 (Fed. Cir. 2003). The opinions of the United States Court of Appeals for Veterans Claims (App., infra 38-61) are reported at 15 Vet.App. 256 (2001) (*en banc*) and 15 Vet.App. 277 (2001).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 24, 2003. A petition for rehearing *en banc* was denied on October 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2412(d)(1)(A) of Title 28 provides, in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of

that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Section 7252(a) of Title 38 provides, in pertinent part:

The Court shall have the power to affirm, modify or reverse a decision of the Board or to remand the matter, as appropriate.

Section 405(g) of Title 42 provides:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under

subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

STATEMENT OF THE CASE

These cases concern the proper legal standard to be applied in determining whether appellants are "prevailing parties" under the Equal Access to Justice Act (EAJA). The United States Court of Appeals for Veterans Claims denied the Petitioners' application on the ground that neither were a "prevailing party." *Vaughn v. Principi*, 15 Vet.App. 277 (2001) and *Sumner v. Principi*, 15 Vet.App. 256 (2001) (*en banc*).

After the death of her husband in 1995, Mrs. Vaughn applied for various veteran survivor benefits. Finding no service connection to the cause of death, the Board of Veterans' Appeals (BVA) denied her claim. Mrs. Vaughn appealed the denial to the United States Court of Appeals for Veterans Claims. While her appeal was pending, Congress enacted Veterans Claims Assistance Act of 2000 (VCAA), Pub.L. No. 106-475, 114 Stat. 2096 (2000). Citing the need for re-adjudication in light of the VCAA, the parties filed a joint motion for remand on the issue of service connection to the cause of death and dismissal of the remaining issues. After the Veterans' Court consented to the remand request, Vaughn filed an EAJA application for attorney fees. *Vaughn v. Principi*, 336 F.3d 1351, 1353 (Fed. Cir. 2003).

Similarly, Mr. Sumner, after being denied his claim for veterans' benefits, appealed to the Veterans' Court. While his appeal was pending, Sumner submitted a motion with the BVA to reconsider his claim based on newly acquired material evidence, specifically, relevant service medical records which had not been obtained by the Agency. Mr. Sumner filed a motion with the Veterans' Court to stay his appeal pending the BVA's decision on his motion for

reconsideration. The Veterans' Court granted the stay and ordered the VA Secretary to advise the court on whether the BVA was inclined to grant the motion for reconsideration and, if so, to file a motion for a "Cerullo remand." *See Cerullo v. Derwinski*, 1 Vet.App. 195 (1991). After advising the Veterans' Court that it was inclined to grant reconsideration, the BVA granted Sumner's motion for reconsideration, stayed the order pending remand from the Veterans' Court, and an unopposed motion for remand was filed in accordance with the prior order. After the Veterans' Court remanded, Sumner filed an EAJA application for award of attorney fees. *Vaughn v. Principi*, 336 F.3d at 1354.

The Veterans' Court denied both EAJA applications. Mrs. Vaughn and Mr. Sumner appealed separately to the United States Court of Appeals for the Federal Circuit. The cases were consolidated and both appeals were decided in the court of appeals' decision which is the subject matter of this appeal.

REASONS FOR GRANTING THE WRIT

The court of appeals erred in holding that this court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993) did not apply. The holding below rests upon a fundamental misunderstanding of this court's holding in *Schaefer* that a remand decision, where jurisdiction is not retained, entitles an appellant to "prevailing party" status under the Equal Access to Justice Act, because a judgment had been entered that vacated the finality of the Agency's prior adverse determination and required the readjudication of the Petitioners' claim for benefit.

Moreover, the court of appeals' decision reliance upon *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.*, 532 U.S. 598 (2001), is misplaced. The holding in *Buckhannon* is limited to the rejection of the catalyst theory as a basis for establishing "prevailing party" status.

A. A Remand by the Veterans' Court is Enough to Establish "Prevailing Party" Status.

Mrs. Vaughn and Mr. Sumner obtained judgments as a consequence of judicial remands in the court below. The Veterans' Court's rule requires that judgment be entered, Vet.App. Rule 41(b), and the Veterans' Court will not retain jurisdiction of appeals remanded to the Board of Veterans' Appeals, *Cleary v. Brown*, 8 Vet.App. 305 (1995). As a result of *Cleary* and Rule 41(b), Mrs. Vaughn and Mr. Sumner were the beneficiaries of orders and judgments vacating the Board of Veterans' Appeals decisions that they appealed and remanding those cases to the agency for readjudication. Under this Court's analysis in *Schaefer*, *supra*, the Petitioners became "prevailing parties" under EAJA.

In *Schaefer*, *supra*, this Court recognized a distinction between a judicial remand in which the remanding court retained jurisdiction and a judicial remand in which jurisdiction is *not* retained. 509 U.S. at 300. While *Schaefer* involves a Social Security case and a specific statute regarding a court's non-retention of jurisdiction, the analysis in *Schaefer* is equally applicable to proceedings before the Veterans' Court based upon the language of 38 U.S.C. § 7252(a) and Vet.App. Rule 41(b). This Court's decision in *Texas State Teachers Assn. v. Garland Independent School*

District, 498 U.S. 782 (1989), held that a party "prevails" "[i]f the plaintiff (appellant) has succeeded on any significant issue on the litigation achieve[d] some of the benefit . . . sought in bringing suit." *Texas State Teachers*, 498 U.S. at 791-792 (citation and internal quotation marks omitted). The Petitioners succeeded in their respective appeals in obtaining a judgment from the Veterans' Court vacating the finality of the Board decision appealed and obtained an order that their respective claims must be readjudicated by the Agency.

Mrs. Vaughn and Mr. Sumner submit that pursuant to *Schaefer* a party prevails by obtaining a remand, *regardless of the basis* for the remand. All remands by the Veterans' Court are analogous to Social Security sentence four remands because of *Cleary* and the Veterans' Court's rule. Because the Veterans' Court does not retain jurisdiction and because the Secretary's decision to deny benefits has been vacated, such judicial remands and final judgments meet the description of having obtained "some relief on the merits," under *Buckhannon*, *Schaefer*, and *Texas State Teachers*, all *supra*.

Such an outcome is entirely compatible with the nature of remands to the agency in veterans matters. A remand is the greatest relief to which most appellants can aspire in the Veterans' Court. *See Swiney v. Gober*, 14 Vet.App. 65, 70 (2000). The Veterans' Court may identify one or more errors in the adjudication of the administrative appeal, *but it does not remand a case solely for correction of the errors* discussed. Instead, any remand by the Veterans' Court vacates the adverse agency decisions, restores the claim to pendency, and gives the claimant a new opportunity for adjudication of the claim anew, with the corresponding new opportunities to marshal and

present evidence and arguments, old or new. *Kutcherousky v. West*, 12 Vet.App. 369, 372-73 (1999). Indeed, the Veterans' Court prefers to require the veteran to take most of his complaints back to the agency. *Best v. Principi*, 15 Vet.App. 18 (2001) (99-1144) *appeal dismissed*, 30 Fed. Appx. 944 (Fed. Cir. 2002); *Mahl v. Principi*, 15 Vet.App. 37 (2001) (99-1678), *appeal dismissed*, 32 Fed. Appx. 547 (Fed. Cir. 2002). A remand by the Veterans' Court entitles appellants to new fact-finding, readjudication of the claim, and an entitlement to a new decision in their respective appeals. Thus, a veteran who has won a remand from the Veterans' Court has gotten not just "some relief on the merits"; he has gotten "some [probably all] of the benefit . . . sought in bringing suit" because a remand is all there is to get in the overwhelming majority before the Veterans' Court. It is simply not logical to say that a veteran who has obtained a remand order from the Veterans' Court is a "prevailing party."

B. The Veterans' Court's Prior Jurisprudence.

Until the *en banc* decision in *Sumner* the state of the law at the Veterans' Court on the issue of "prevailing party" was stable and consistent with this court's decision in *Schaefer*. Beginning with *Stillwell v. Brown*, 6 Vet.App. 291 (1994), the Veterans' Court had determined "prevailing party" status on the basis that a remand alone was enough. Indeed, the Veterans' Court confessed as much in its extensive treatment of *Stillwell* in *Sumner* at 15 Vet.App. 262-64. *See also Vaughn*, 15 Vet.App. at 279. Thereafter, however, the Veterans Court invented a new rule of law creating, a new prerequisite to "prevailingness": "[A] remand does not constitute 'some relief on the merits' unless that remand is *predicated upon administrative*

error." Sumner, 15 Vet.App. at 264. At that moment, the Veterans Court below introduced two new terms and two corresponding new requirements not found in 28 U.S.C. § 2412: "predicatedness" and "administrative error." As a consequence, the Veterans Court's EAJA jurisprudence became inconsistent with the statute and this court's holding in *Schaefer*. The court of appeals' decision affirms this misinterpretation of the statute and failed to follow this court's holding in *Schaefer*.

However, that was not the end of the disruption of the EAJA jurisprudence, since *Sumner* the Veterans' Court has invented more new prerequisites to "prevailingness." In *Cycholl v. Principi*, "administrative error" morphed without explanation into "adjudicative error." 15 Vet.App. 355, 359 (2001) (twice). Another panel of the court of appeals in *Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360 (Fed. Cir. 2003) generated the term "alleged error," possibly a more generous standard but still a requirement not found in the statute. In *McCormick v. Principi*, 16 Vet.App. 407 (2002), the Veterans' Court announced that the error must be "recognized." Recently the Veterans' Court added that the remand must not be a "*Maggitt*[1]-type remand" in *Gordon v. Principi*, 17 Vet.App. 221 (2003). In *Halpern v. Principi*, 17 Vet.App. 225 (2003), the Veterans' Court introduced a new rule of law that "prevailingness," even though once conceded,

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[1] *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000). *Maggitt* permits the court below to remand a case to the Board to require the Board to consider in the first instance an argument first raised in the court below. Thus, the court below may remand where error is asserted but none is found, and such a remand is not regarded as sufficient to established "prevailingness."

can still be taken away! The decision of the court of appeals in *Vaughn* and *Sumner* was decided without addressing the "administrative error" requirement which has given license to the Veterans' Court to continue to create requirements not found in the EAJA statute.

While all the considerations noted by the Veterans Court are legitimate regarding the disposition of an EAJA application, such matters should be considered but only upon the election and insistence of the *government* as bearing whether its positions were "substantially justified," as the statute permits, not as *sua sponte* matters raised by the reviewing court. The statutory analysis is elegant in its simplicity and gives each party a share of the burden and an opportunity to have its say. Instead, however, the Veterans Court mistakenly moved such factors to the "prevailingness" step of the analysis, in a transparent effort to short circuit EAJA litigation. This misinterpretation of "prevailing party" impermissibly shifts the burden to the appellant and the Court of Appeals' decision to affirm the Veterans Court corrupts the statutory scheme for resolution of EAJA applications, and the result is inconsistent with this Court's decisions on "prevailingness."

C. Compare 38 U.S.C. § 7252(a) to 42 U.S.C. § 405(g).

In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), this court analyzed the language and meaning of 42 U.S.C. § 405(g) concluding that the District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, and set aside

that determination. *Finkelstein*, 496 U.S. at 625. Similarly, the Petitioners submit a Veterans' Court remand order is unquestionably a "judgment" which has terminated the civil action challenging the Board's final determination that the appellant was not entitled to benefits and set aside the Board's determination to the contrary.

In *Finkelstein*, this court examined the fourth sentence of § 405(g) of Title 42 that in a civil action, the district court shall have the power to enter "a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause of a rehearing." *Finkelstein*, 496 U.S. at 625. Similarly, the Veterans' Court pursuant to 38 U.S.C. § 7252(a), has the power to "affirm, modify or reverse a decision of the Board or remand the matter, **as appropriate**." (Emphasis added)

The Petitioners concede that Title 38 does not reference the Veterans' Court's authority to enter judgment. However, as has been previously noted, the Veterans' Court by rule and caselaw have concluded that jurisdiction shall not be retained in cases remanded by the Veterans' Court and that final judgment shall be entered following a court ordered remand. *See* Vet.App. Rule 41(b) and *Cleary v. Brown*, 8 Vet.App. 305 (1995). As a consequence, the issuance of a remand order by the Veterans' Court is a final judgment.

D. From Hudson to Schaefer.

In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this court held that under the EAJA, 28 U.S.C. § 2412(d)(1)(A), a federal court may award a Social Security claimant attorney's fees for representation provided during administrative proceedings held pursuant to a district court order

remanding the action to the Secretary. *Hudson*, 490 U.S. at 890. *Hudson* dealt with a circumstance in which the district court retained jurisdiction during administrative proceedings ordered pursuant to the court's remand.

This court noted in *Hudson* that the language of § 2412(d)(1)(A), must be construed with reference to the purpose of the EAJA and the realities of litigations against the government. *Hudson*, 490 U.S. at 890. The Petitioners submit that similarly, the language of § 2412(d)(1)(A) regarding "prevailing party" status must be likewise construed. Specifically, as noted in *Hudson*:

> The purpose of the EAJA was to counterbalance the financial disincentives to vindicating rights against the Government through litigation; given this purpose, we could not believe that Congress would "throw the Social Security claimant a life-line that it knew was a foot short" by denying her attorney's fees for the mandatory proceedings on remand. *Hudson*, 490 U.S. at 890

In *Hudson*, the court concluded that a claimant in a remand where jurisdiction was retained by the district court could not be a "prevailing party" for purposes of the EAJA until the result of the administrative proceeding on remand was known. *Hudson*, 490 U.S. at 887-888.

In *Schaefer*, this court recognized the distinction between the circumstances in *Hudson* where the court did not retain jurisdiction and the circumstances presented in the matter where the court did not retain jurisdiction. Under *Schaefer*, whenever judgment is entered as a consequence of a judicial remand, and the remanding court does not retain jurisdiction in the appeal of an administrative decision of a federal agency, the party

obtaining such a remand is, as a matter of law, a "prevailing party." The court of appeals incorrectly focused on whether the Veterans' Court reached or had made a "merit determination," when all that is required under *Schaefer* is a remand to an agency by a court which does not retain jurisdiction.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
for the Federal Circuit

02-7019

SYBLE M. VAUGHN,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

02-7169

W. T. SUMNER,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

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Barbara J. Cook, of Cincinnati, Ohio, for amicus curiae National Organization of Veterans Advocates in 02-7019.

Frank E. Howard, of Oakland, California, for amicus curiae Donald B. Gold.

Appealed from: United States Court of Appeals for Veterans Claims

Chief Judge Kenneth B. Kramer

DECIDED: July 24, 2003

Before NEWMAN, RADER and GAJARSA, *Circuit Judges*.

RADER, *Circuit Judge*.

Syble Vaughn and W.T. Sumner (collectively, appellants) separately appeal the United States Court of Appeals for Veterans' Claims (Veterans' Court) denial of their applications for award of attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2000). The Veterans' Court denied their applications on the ground that neither was a "prevailing party." *Vaughn v. Principi,* 15 Vet. App. 277 (2001); *Sumner v. Principi,* 15 Vet. App. 256 (2001) (*en banc*). Because

the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.*, 532 U.S. 598 (2001), and this court's decision in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002), preclude Vaughn and Sumner from attaining "prevailing party" status under EAJA, this court affirms both decisions.

I.

After the death of her husband in 1995, Vaughn applied for various veteran survivor benefits. Finding no service connection to the cause of death, the Board of Veteran's Appeals (BVA) denied her claims. Vaughn appealed the denial to the Veterans' Court. While her appeal was pending, Congress enacted the Veteran's Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000). Citing the need for re-adjudication in light of the VCAA, the parties filed a joint motion for remand on the issue of service connection to the cause of death and dismissal of the remaining issues. After the Veterans' Court consented to the remand request, Vaughn filed an EAJA application for attorney fees. The EAJA provides, in part, that:

> [A] court shall award to a *prevailing party* other than the United States fees and other expenses . . . incurred by that party in any civil action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (2000) (emphasis added). The Secretary of Veterans Affairs (VA Secretary) opposed

Vaughns EAJA application on the grounds that her assertion of prevailing party status was premised on, *inter alia,* the catalyst theory.

After Vaughns EAJA application, the Supreme Court issued its decision in *Buckhannon. Buckhannon* addressed the issue of whether a party is entitled to attorney fees as a "prevailing party" under the catalyst theory. According to the catalyst theory, a prevailing party is one that "achieve[s] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon,* 532 U.S. at 601. *Buckhannon* held that "the 'catalyst theory' is not a permissible basis for the award of attorney fees under the FHAA [Fair Housing and Amendments Act of 1988], 42 U.S.C. § 3613(c)(2), and the ADA [Americans with Disabilities Act], 42 U.S.C. § 12205." *Id.* at 610.

Because *Buckhannon* did not explicitly address the catalyst theory as a basis for awarding attorney fees under EAJA, the Veterans' Court requested supplemental briefs from Vaughn and the VA Secretary. After considering the supplemental briefs, the Veterans' Court denied Vaughn's EAJA application. The Veterans' Court reasoned that *Buckhannon* precluded Vaughn from achieving prevailing party status "under the merits, catalyst, or inevitable-victory tests based on obtaining a remand solely for re-adjudication in light of the enactment of the VCAA." *Vaughn,* 15 Vet. App. at 280.

II.

The Veterans' Court similarly denied Sumner's EAJA application. After the BVA denied his claim for veteran's benefits, Sumner appealed to the Veterans' Court. While

his appeal was pending, Sumner submitted a motion with the BVA to reconsider his claim based on newly acquired material evidence. He also filed a motion with Veterans' Court to stay his appeal pending the BVA's decision on his motion for reconsideration. The Veterans' Court granted the stay and ordered the VA Secretary to advise the court on whether the BVA was inclined to grant the motion for reconsideration and, if so, to file a motion for a "Cerullo remand." *See Cerullo v. Derwinski,* 1 Vet. App. 195 (1991). After advising the appeals court that it was inclined to grant reconsideration, the BVA granted Sumner's motion for reconsideration, stayed the order pending remand from the Veterans' Court, and filed an unopposed motion for remand in accordance with the prior order. After the Veterans' Court remanded, Sumner filed an EAJA application for award of attorney fees. Sumner argued that he was a "prevailing party" under the merits or catalyst theory. In an *en banc* decision, the Veterans' Court denied his application, holding that *Buckhannon* precluded Sumner from attaining "prevailing party" status under the merits or catalyst theory. According to the *en banc* decision, *Buckhannon* and *Shalala v. Schaefer,* 509 U.S. 292 (1993), together hold that granting of prevailing party status requires "ultimate receipt of a benefit that was sought in bringing the litigation . . . or, at a minimum, a court remand predicated on administrative error." *Sumner,* 15 Vet. App. at 264.

Vaughn and Sumner appealed separately to this court. Because the two cases present similar facts and concern the same legal issue, this court addresses both Vaughn's and Sumner's appeals with this opinion.

III.

These two cases require this court to determine whether the Veterans' Court applied the proper legal standard in determining whether appellants are "prevailing parties" under EAJA. This court reviews an interpretation of EAJA by the Veterans' Court without deference. *Jones v. Brown,* 41 F.3d 634, 637 (Fed. Cir. 1994). However, this court is precluded from reviewing "a challenge to a law or regulation as applied to the facts of a particular case" in the Veterans' Court. 38 U.S.C. § 7292(d)(2)(B) (2000), *Halpern v. Principi,* 313 F.3d 1364, 1369 (Fed. Cir. 2002).

In *Buckhannon,* the Supreme Court rejected the catalyst theory as a permissible basis for award of attorney fees as a "prevailing party." Buckhannon Board and Care Home, Inc. (Buckhannon), owned and operated assisted living homes. A state fire marshal's inspection found that the Buckhannon assisted living homes failed West Virginia's "self-preservation" law requiring all residents to be capable of removing themselves from situations of imminent danger, such as fire. *Buckhannon,* 532 U.S. at 600. Buckhannon sued the state in the United States District Court for the Northern District of West Virginia seeking declaratory and injunctive relief that the state's self-preservation law violated the FHAA and the ADA. With the case pending in the district court, the state legislature enacted two bills that eliminated the self-preservation requirement. *Id.* at 601. As a result, the state moved to dismiss the case as moot. After the district court granted the motion, Buckhannon sought attorney fees under the FHAA and ADA as a "prevailing party" based on the theory that the litigation had been the catalyst for achieving ultimate victory outside court. *Id.* at 601-02.

In *Buckhannon,* the Supreme Court drew a bright line distinguishing "prevailing parties" from plaintiffs not entitled to an award of attorney fees. On one side of the line, an enforceable judgment on the merits and a court-ordered consent decree permit "prevailing party" status and an award of attorney fees. *Id.* at 604. On the other side of the line, achievement of the desired result by the catalyst theory precludes an award of attorney fees as a "prevailing party." *Id.* In rejecting the catalyst theory, the Court observed: "[A] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605.

Buckhannon rejected the catalyst theory as a basis for determining a "prevailing party" specifically under the FHAA and the ADA. In *Brickwood,* 288 F.3d at 1379, this court held that *Buckhannon's* rejection of the "catalyst theory" applied to EAJA. Because *Brickwood* precludes the catalyst theory as a basis for the award of attorney fees under EAJA, this court need not address appellant's arguments to the contrary.

IV.

The issue in the present cases is on which side of the Supreme Court's bright line appellants' remands fall – on the side with a judgment on the merits and a court-ordered consent decree that may qualify Vaughn and Sumner as "prevailing parties" or on the side in which *Buckhannon* and *Brickwood* preclude an award of attorney fees to mere catalysts. Under the catalyst theory, a party achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. In

both cases appellants received a desired result of their respective appeals – a remand to allow the BVA to reconsider the claim for benefits. And in both cases, appeal of the denial of benefits to the appeals court brought about a voluntary change in the defendant's conduct.

In Vaughn's case, the voluntary change in conduct was the VA Secretary's filing of a motion to remand for re-adjudication based on enactment of the VCAA. In Sumner's case, the voluntary change in conduct was the VA Secretary's filing of a motion to remand for re-adjudication based on new material evidence. Therefore, both appellants seek attorney fees for work done on the appeals to the Veterans' Court. Because Vaughn and Sumner achieved a desired result – remands to the BVA – and the appeals brought about a voluntary change in the VA Secretary's conduct, both appellants' EAJA applications for attorney fees are premised on the catalyst theory. Indeed, both appellants admit their reliance on the catalyst theory.

Moreover, the remand orders in these cases do not resemble the types of outcomes that the Supreme Court identified as "prevailing." *Buckhannon* held that a judgment on the merits affords "prevailing party" status because "a plaintiff receive[d] at least some relief on the merits of his claim." *Buckhannon,* 532 U.S. at 603 (citing *Farrar v. Hobby,* 506 U.S. 103, 121 (1992)). *Buckhannon,* however, established a threshold level of relief to afford prevailing party status by providing two examples of relief that fall below that threshold. In the first example, the Court recognized that "an interlocutory ruling that reverses a dismissal for failure to state a claim 'is not the stuff of which legal victories are made.'" *Id.* at 605 (quoting *Hewitt v. Helms,* 482 U.S. 755, 760 (1987)). In the second example, the Court acknowledged that a "reversal

of a directed verdict for defendant does not make plaintiff a 'prevailing party.'" *Id.* (citing *Hanrahan v. Hampton,* 466 U.S. 754, 754 (1980)). Appellants' remands, similar to a ruling that reverses a dismissal for failure to state a claim, provide only the opportunity for further adjudication. Thus, while the Veterans' Court's remand order arguably provided appellants some relief, the level of that relief fails to qualify as "prevailing," as the Supreme Court's directed verdict and interlocutory ruling examples show.

Buckhannon also held that "settlement agreements enforced through a consent decree may serve as the basis for an award of attorney fees." *Id.* at 604 (citing *Maher v. Gagne,* 448 U.S. 122 (1980)). A consent decree is "[a] judgment entered by consent of the parties whereby defendant agrees to stop alleged illegal activity without admitting guilt," or a decree that is "in effect an admission by [the parties] that the decree is a just determination of their rights upon the real facts of the case." *Black's Law Dictionary* 410-11 (6th ed. 1991). In *Maher,* a recipient of federally funded state assistance filed suit alleging that the state's administration of the program violated the Social Security Act. *Maher,* 448 U.S. at 124. The recipient claimed that state regulations denied her credit for substantial portions of her actual work-related expenses, thus reducing the level of her benefits. *Id.* Upon negotiated settlement, the district court entered a consent decree that substantially granted all the relief originally requested in recipient's complaint relating to deductions for actual work-related expenses. *Id.* at 126-27.

In contrast to a consent decree, Vaughn's and Sumner's remands included neither a judgment nor a determination of the rights of the parties based on the facts of the case. Because the Veterans' Court did not reach the merits

of appellants' cases, the only admission or agreement reached between appellants and the BVA was that the cases should be remanded. In neither case did the remand from the Veterans' Court substantially grant all of appellants' previously requested veterans' benefits.

Accordingly, this court affirms the judgments of the Veterans' Court in these cases because it applied the correct legal standard, as articulated in *Buckhannon.* That is, a party must receive "at least some relief on the merits of his claim." *Buckhannon,* 532 U.S. at 603 (citing *Farrar v. Hobby,* 506 U.S. 103, 121 (1992)). That relief must rise to the level of "enforceable judgments on the merits and court ordered consent decrees [creating a] material alteration of the legal relationship of the parties." *Id.* at 604. Minimal relief resembling "an interlocutory ruling that reverses a dismissal for failure to state a claim" or a "reversal of a directed verdict" will not satisfy the statutory requirements to achieve prevailing party status. *Id.* at 605 (quoting *Hewitt v. Helms,* 482 U.S. 755, 760 (1987) and *Hanrahan v. Hampton,* 466 U.S. 754, 754 (1980)). This court agrees with the Veterans' Court's conclusions that appellants' remands are not judgments on the merits or consent decrees or similar results that qualify as prevailing under EAJA. This court further holds that the catalyst theory is an improper basis for an award of attorney fees as a "prevailing party" under EAJA.

V.

Although appellants' counsel noted at oral argument that *Shalala* does not apply to these cases, amici argue that the remands entitle appellants to attorney fees under the Supreme Court's *Shalala* holding. In *Shalala,* a

disability claimant appealed denial of his claim for Social Security benefits to the district court. *Shalala,* 509 U.S. at 294. The district court held that the agency had committed three errors in denying the claim. It reversed the agency's denial of benefits and remanded the case back to the agency for further consideration under sentence four of 42 U.S.C. § 405(g). *Id.* Upon reconsideration, the agency granted the claimant's application for benefits. The claimant then filed an EAJA application for attorney fees. The Supreme Court affirmed the Eighth Circuit's judgment granting attorney fees.

Although the claimant in *Shalala* received a remand back to the administrative agency level, as did the appellants in the present cases, *Shalala* is inapposite for two reasons. First, award of attorney fees under EAJA in *Shalala* was not premised on the catalyst theory. Rather than a voluntary change in the VA Secretary's conduct, the claimant in *Shalala* achieved the desired result as a consequence of the district court's judgment after reaching the merits of the case. The district court reversed the agency's denial of benefits and remanded the case, holding that the Secretary of Health and Human Services (HHS Secretary) had committed errors in denying the requested benefits. *Id.*

Second, *Shalala* is inapposite to the present cases because it concerns a "sentence four remand." Sentence four of 42 U.S.C. § 405(g) relates to judicial review of Social Security benefits determinations. It requires "a district court to enter a judgment 'with or without' a remand order." *Id.* at 297. On appeal, a district court must reach the merits of the case and immediately enter judgment. If necessary, sentence four allows remand with the judgment. Thus, an award of attorney fees after a sentence

four remand is consistent with the holdings of *Buckhannon* and *Brickwood* because the unique statutory language of sentence four includes a judgment on the merits with any remand order. In these cases, the remand did not include any judgment on the merits and, thus, *Shalala* does not apply.

The VA Secretary's brief in the present cases concedes that "a [Veterans' Court] remand with instructions concerning the merits of the claim is akin to a district court's remand, in a Social Security case, pursuant to 'sentence four' of 42 U.S.C. § 405(g)." Because neither of appellants' remands included instructions concerning the merits, resolution of the issue is not necessary to decide Vaughn's and Sumner's appeals and this court does not do so.

Amici's reliance on the sentence four remand in *Shalala* for the general proposition that a remand affords "prevailing party" status under the EAJA is misplaced because the statutory scheme that underlies the Social Security benefits system differs from that of the veterans' benefits system. For the same reason, the Supreme Court's decisions granting prevailing party status based on sentence six remands is unavailing to award Vaughn and Sumner attorney fees. In reviewing Social Security benefits cases on appeal, "the exclusive methods by which the district courts may remand to the [HHS] Secretary are set forth in sentence four and sentence six of 42 U.S.C. § 405(g)." *Id.* at 296. Sentence six provides that following a sentence six remand, "the [HHS] Secretary must return to the district court to 'file with the court any such additional or modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.'" *Melkonyan v. Sullivan,* 501 U.S. 89, 98 (1991) (quoting 42 U.S.C.

§ 405(g) (2000)). Thus, in sentence six cases, the district court retains jurisdiction. The HHS Secretary must return to the district court after the post-remand proceedings to allow the district court to enter a final judgment. *Id.* at 97. In neither of appellants' cases did the Veterans' Court retain jurisdiction and require the BVA to return to the Veterans' Court to enter final judgment. Thus, again the unique statutory scheme for Social Security cases differs from the remands in these cases and affords appellants no opportunity to suggest that sentence six remands provide a basis for appellants in these cases to attain "prevailing party" status.

VI.

Appellants also argue that they are "prevailing parties" based on the "inevitable victory theory." Under the inevitable victory theory, a party prevails when a case is remanded due to a change in the law and a court finds that the party would have prevailed absent the change in the law. The Veterans' Court has never accepted the inevitable victory theory.

Only the Fourth and Sixth Circuits recognize the inevitable victory theory in awarding attorney fees. The Sixth Circuit addressed the issue in *Perket v. Secretary of Health and Human Services.*, 905 F.2d 129 (6th Cir. 1990). In *Perket,* the HHS Secretary terminated appellant's disability insurance benefits. At the time the HHS Secretary terminated the benefits, regulations interpreted the Social Security Act not to require medical improvement in the claimant's disability before termination. Before the district court reached the merits, Congress passed the Social Security Disability Benefits Reform Act of 1984 that

mandated remand to the HHS Secretary of all pending disability termination cases for reevaluation under the new law. *Id.* at 131. The new law required termination to be supported by a showing of medical improvement and remand of cases pending as of a certain date to be remanded to the HHS Secretary for reevaluation. *Id.*

Before enactment of the new law, however, the Sixth Circuit had ruled that a showing of medical improvement must support termination of benefits. *Haynes v. Secy. of Health Human Servs.,* 734 F.2d 284, 288 (6th Cir. 1984). As a result, upon application for attorney fees, the Sixth Circuit held that the party had prevailed because it was "clear beyond doubt that [the party] would have prevailed in his suit even if [the new law] had not been enacted." *Perket,* 905 F.2d at 133. In other words, the Sixth Circuit granted prevailing party status because it found, based on precedent established by *Haynes,* that the party would have prevailed even absent enactment of the new law. *Id.; see also Rhoten v. Bowen,* 854 F.2d 667, 670 (4th Cir. 1988) (granting attorney fees because applicant would have prevailed based on Fourth Circuit precedent despite enactment of a new law that codified precedent).

The First, Fifth, Seventh, Eighth, and Ninth Circuits reject the inevitable victory theory. These Circuits do so because it "requires nothing less than the hypothetical relitigation of cases which, because of [an intervening event], need not be litigated at all." *Peter v. Jax,* 187 F.3d 829, 835 (8th Cir. 1999) (citing *Guglietti v. Sec'y of Health & Human Servs.,* 900 F.2d 397, 403 (1st Cir. 1990)); *Milton v. Shalala,* 17 F.3d 812, 815 (5th Cir. 1994); *Petrone v. Sec'y of Health & Human Servs.,* 936 F.2d 428, 430 (9th Cir. 1991); *Hendricks v. Bowen,* 847 F.2d 1255, 1260-61 (7th Cir. 1988). These Circuits recognized that acceptance

of the inevitable victory theory would cause "fee disputes to 'spawn a second litigation of significant dimension.'" *Id.* (quoting *Guglietti,* 900 F.2d at 403). The Supreme Court rejected the catalyst theory in *Buckhannon* for the same reason. *Buckhannon,* 532 U.S. at 609.

In the present cases, the VA Secretary presents three reasons to reject the inevitable victory theory. First, the VA Secretary argues that the inevitable victory theory requires determination of whether benefits would have been awarded, in particular to Vaughn, notwithstanding a change in the law. According to the VA Secretary, that determination would require a "second major litigation," the result the Supreme Court sought to prevent in *Buckhannon.*

Vaughn counters that the Supreme Court was concerned only with avoiding a second major litigation over fee-related issues, such as the number of hours reasonably spent on the litigation. Vaughn, however, is incorrect. The Supreme Court was concerned with litigation over "entitlement to an award," as well as over litigation over appropriate hours expended and hourly rates. *Id.* (citing *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983)). Thus, the Supreme Court's reasoning supports the VA Secretary's first point.

Second, the VA Secretary argues that *Buckhannon* and *Brickwood* establish that a party obtaining a remand can prevail under EAJA only if the remand itself provides some enforceable relief. According to the VA Secretary, the inevitable victory theory violates *Buckhannon* and *Brickwood* because a remand due solely to a change in the law allows the merits of the underlying claim to be addressed for the first time after remand. Because Vaughn's remand

to the BVA is not an enforceable judgment on the merits, the Supreme Court's reasoning again supports the VA Secretary's contention.

Finally, the VA Secretary argues that use of the inevitable victory theory would amount to the appeals court instructing the BVA that the veteran should prevail on remand. According to the VA Secretary, this would usurp the authority of the BVA to make factual findings in the first instance in remanded cases. To the contrary, as the VA Secretary conceded in his brief, a remand instructing the BVA that the veteran should prevail is "akin" to a sentence four remand of a Social Security benefits case. Thus, this third argument lacks merit.

After considering the arguments made by the parties and the rationale employed by our sister courts, this court rejects the inevitable victory theory as a basis to attain "prevailing party" status under EAJA. The bright line reasoning of the Supreme Court in *Buckhannon* shows that the majority of our sister circuits are correct in rejecting this basis to attain "prevailing party" status.

This holding is compatible with that of *Former Employees of Motorola Ceramic Products v. United States,* No. 02-1223, also issued today. Although that holding was not unanimous, as explained therein, the facts of these cases are readily distinguishable at the point at which their holdings diverge. Thus, for both Vaughn and Sumner, their request for attorney fees is for an intermediate event that did not involve a merit determination, in Vaughn's case a change in law and in Sumner's case the discovery of new evidence. In both cases the government agreed to a remand to the Board, and the remands have not resulted in a decision on the merits of their claims. In neither case did

the Veterans' Court suggest that these new events might change the result; the Vaughn and Sumner requests for attorney fees are founded solely on the remand for further proceedings without a determination of error.

In contrast, in *Former Employees* the remand for further proceedings was made upon agency recognition that it had taken an incorrect position on the merits; there was a stipulated remand, followed by further proceedings and an award of the benefits that the plaintiffs had been seeking. With the successful outcome of the further proceedings, these plaintiffs were prevailing parties.

CONCLUSION

For the foregoing reasons, this court affirms the Veterans' Court holdings that appellants are not "prevailing parties" under EAJA.

COSTS

Each party shall bear its own costs.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: 07/24/03

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The Clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

/s/ Jan Horbaly/bs
JAN HORBALY
Clerk

cc: KENNETH M. CARPENTER
CHRISTIAN J. MORAN
BARTON STICHMAN, BARBARA COOK,
F. HOWARD

VAUGHN V DVA, 02-7019
CVA-00-1534

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-7019

SYBLE M. VAUGHN,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Oct. 3, 2003)

A petition for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 10, 2003.

FOR THE COURT,

/s/ Jan Horbaly (A.V.)
Jan Horbaly
Clerk

Dated: October 3, 2003

cc: Kenneth M. Carpenter
Christian J. Moran
Barton Stichman, Barbara Cook, F. Howard
Mark R. Lippman

VAUGHN V DVA, 02-7019
(CVA-00-1534)

* *
* Note: Pursuant to Fed. Cir. R. 47.6, this order is not *
* citable as precedent. It is a public record. *
* *

App. 22

02-7019 & 02-7169

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SYBLE M. VAUGHN & W. T. SUMNER
Claimants-Appellants,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,
Respondent-Appellee.

APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 99-0368 & 00-1534
JUDGE KENNETH B. KRAMER

APPELLANTS' PETITION FOR REHEARING *EN BANC* AND ADDENDUM

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimants-Appellants Syble M. Vaughn & W. T. Sumner certifies the following:

1. The full name of every party or amicus represented by me is:

   Syble M. Vaughn & W. T. Sumner.

2. The name of the real party in interest represented by me is:

   None.

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this matter requires rehearing *en banc* because the Court did not properly apply the criteria for prevailing party status set out in ***Shalala v. Schaefer***, 509 U.S. 292 (1993).

Furthermore, the stability and predictability of EAJA jurisprudence in veterans benefits law is a matter of extraordinary importance, and it has been disrupted. Veterans who last long enough in the quest for benefits to appeal to the United States Court of Appeals for Veterans Claims are likely to be poor, and they are disadvantaged because of the circumstances of the disabilities for which they are seeking compensation and by a statutory scheme[1] which effectively prevents representation by attorneys in the proceedings leading up to a first final decision of the Board of Veterans' Appeals. It is the prospect of awards of fees under EAJA that gives an adequate number of lawyers the necessary level of incentive to become proficient in veterans benefits law and to accept impecunious clients. The decision in ***Vaughn and Sumner*** disrupts the EAJA jurisprudence by imposing a prerequisite to the award not required by the statute.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Attorney for Appellants

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[1] Under 38 U.S.C. § 5904(c), a fee may not be charged or paid in the case of services provided before a first final decision of the Board of Veterans' Appeals. *See also* 38 U.S.C. § 5905 which imposes criminal penalties for the direct or indirect solicitation, contract for charging or receiving of compensation expect [sic] as provided under § 5904.

02-7019 & 02-7169

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SYBLE M. VAUGHN & W. T. SUMNER,
Claimants-Appellants,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANTS' PETITION FOR REHEARING *EN BANC* AND APPENDIX

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court's Rules, Syble M. Vaughn & W. T. Sumner, respectfully move for a rehearing *en banc* of the July 24, 2003, decision of the Court affirming the decision of the Veterans Court.

POINTS OF LAW TO BE CONSIDERED

Appellants respectfully submit that the panel decision of July 24, 2003 is inconsistent with the Supreme Court's decision in ***Shalala v. Schaefer***, 509 U.S. 292 (1993). The panel mistakenly focused on the *basis* for the relief obtained by Mrs. Vaughn and Mr. Sumner before the Veterans Court rather than on whether the remand order to the administrative agency constituted the securing of "some relief on the merits." ***Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.***, 532 U.S. 598 (2001). A sister panel made a similar mistake in ***Former Employees of Motorola Ceramic Products v. United States,*** No. 02-1223 (Fed.Cir. July 24, 2003), when it added "alleged error" to

the test. But under ***Buckhannon*** and the Supreme Court cases relied upon therein, a judicial remand itself is sufficient to establish prevailing party status where the remanding court does not retain jurisdiction.

I. A Remand is Enough.

A. The Case Below.

Mrs. Vaughn and Mr. Sumner obtained judgments as a consequence of judicial remands in the court below. The Veterans Court's rule requires that judgment be entered, Vet.App. Rule 41(b), and the Veterans Court will not retain jurisdiction of appeals remanded to the Board of Veterans' Appeals, ***Cleary v. Brown***, 8 Vet.App. 305 (1995). As a result of ***Cleary*** and Rule 41(b), Mrs. Vaughn and Mr. Sumner were the beneficiaries of orders and judgments vacating the Board of Veterans' Appeals decisions that they appealed and remanding those cases to the agency. Under the Supreme Court's analysis in ***Shalala,*** *supra.*, they became "prevailing parties" under EAJA.

B. *Schaefer* and the *Texas State Teachers.*

In ***Schaefer*** the Supreme Court recognized a distinction between a judicial remand in which the remanding court retained jurisdiction and a judicial remand in which jurisdiction is *not* retained. 509 U.S. at 300. While ***Schaefer*** involves a Social Security case and a specific statute regarding a court's non-retention of jurisdiction, the analysis in ***Schaefer*** is applicable to proceedings before the Veterans Court by analogy. The Supreme Court's decision in ***Texas State Teachers Assn. v. Garland Independent School District***, 498 U.S. 782 (1989), held that a party "prevails" "[i]f the plaintiff (appellant) has

succeeded on any significant issue on the litigation achieve[d] some of the benefit . . . sought in bringing suit." ***Texas State Teachers*** at 791-792 (citation and internal quotation marks omitted).

Mrs. Vaughn and Mr. Sumner submit that pursuant to ***Schaefer*** a party prevails by obtaining a remand, *regardless of the basis* for the remand. All remands by the Veterans Court are analogous to Social Security sentence four remands because of ***Cleary*** and the Veterans Court's rule. Because the Veterans Court does not retain jurisdiction and because the Secretary's decision to deny benefits has been vacated, such judicial remands and final judgments meet the description of having obtained "some relief on the merits," under ***Buckhannon***, ***Schaefer***, and ***Texas State Teachers***, all *supra*.

Such an outcome is entirely compatible with the special nature of remands to the agency in veterans matters. A remand is the greatest relief to which most appellants can aspire in the Veterans Court. *See* ***Swiney v. Gober***, 14 Vet. App. 65, 70 (2000). The Veterans Court may identify one or more errors in the adjudication of the administrative appeal, *but it does not remand a case solely for correction of the errors* discussed. Instead, any remand by the Veterans Court vacates the adverse agency decisions, restores the claim to pendency, and gives the claimant a new opportunity for adjudication of the claim anew, with the corresponding new opportunities to marshal and present evidence and arguments, old or new. ***Kutcherousky v. West***, 12 Vet. App. 369, 372-73 (1999). Indeed, the court below prefers to require the veteran to take most of his complaints back to the agency. ***Best v. Principi***, 15 Vet. App. 18 (2001) (99-1144) *appeal dismissed*, 30 Fed. Appx. 944 (Fed. Cir. 2002); ***Mahl v. Principi***, 15 Vet. App.

37 (2001) (99-1678), *appeal dismissed*, 32 Fed. Appx. 547 (Fed. Cir. 2002). The remand therefore becomes important both for new fact-finding, re-adjudication of the claim, and as an extension of the appeal! Thus, a veteran who has won a remand from the Veterans Court has gotten not just "some relief on the merits"; he has gotten "some [probably all] of the benefit . . . sought in bringing suit" because a remand is all there is to get in the overwhelming majority of such cases. It is simply not logical to say that a veteran holding a remand order in his hand has not "prevailed."

C. *Former Employees* is Mistaken, Too.

This Court recently remarked in ***Former Employees of Motorola Ceramic Products v. United States,*** No. 02-1223 (Fed.Cir. July 24, 2003), that where appellant "secure[s] a remand requiring further agency proceedings *because of alleged error* by the agency, the plaintiff [appellant] qualifies as a prevailing party (1) without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court. . . . " ***Former Employees***, Slip Op. p. 9 (emphasis added). The innocent addition of "alleged error" is not further discussed (probably because the error was conceded), and the discussion at that point is academic, not the holding of the decision. Nonetheless, it deviates from the more generous rule in ***Schaefer***: A remand is enough, regardless of basis.

Under ***Schaefer***, whenever judgment is entered as a consequence of a judicial remand, and the remanding court does not retain jurisdiction in the appeal of an administrative decision of a federal agency, the party obtaining such a remand is, as a matter of law, a "prevailing party." The panel affirmed the court below because it

determined that "the Vaughn and Sumner requests for attorney fees are founded solely on the remand for further proceeding *without a determination of error*," ***Vaughn/Sumner***, Slip Op. p. 14 (emphasis added), but that is inconsistent with ***Schaefer***. ***Vaughn/Sumner*** incorrectly focuses on whether the Veterans Court reached or made a "merit determination," when all that is required by the Supreme Court is (1) a remand (2) to an agency (3) by a court (4) which does not retain jurisdiction. Then, when it added "merit determination," it departed from the "alleged error" standard in ***Former Employees***, and a division among the panels has resulted.

Whether the criteria is "alleged error," as generous as that term might be, or "merit determination," the Court has nonetheless added some prerequisite to "prevailingness" that is not contemplated by either the statute or ***Schaefer***.

II. The Substantial Justification Requirement of EAJA.

A. *Vaughn/Sumner's* Consideration of Substantial Justification

Under the EAJA in order to obtain reimbursement for attorney fees and expenses, an appellant must not only be a prevailing party but must also *allege* that the government's position at either the administrative or litigation level (or both) lacked substantial justification. Under the ***Schaefer*** criteria for "prevailing party" status, the judicial remands obtained by Mrs. Vaughn and Mr. Sumner would make them "prevailing parties," but that does not end the matter. The burden, under EAJA, thereafter shifts to the

government to demonstrate that the government's administrative and litigation positions were "substantially justified."

Mrs. Vaughn and Mr. Sumner submit that the panel decision was mistaken when it looked to the reason for the remand by the Veterans Court (a change in law and the discovery of new evidence). Those considerations are more properly to be addressed by the reviewing court in the context of "substantial justification," not as a test for "prevailing party status." The panel decision assumed that there could be no circumstances in which a change in law or the submission of new evidence, during the pendency of an appeal, could not, *ipso facto*, defeat an application for attorney fees and expenses under EAJA because such an event would deprive the appellant of "prevailingess" regardless of whether the government's position in such circumstances was "substantially justified."

Furthermore, putting basis for the remand in the "prevailingness" analysis instead of leaving it in the "substantial justification" analysis truncated the analysis prematurely. The panel in ***Vaughn/Sumner*** concluded that "their request for attorney fees is for [fees relating to] an intermediate event that *did not involve a merit determination*, in Vaughn's case a change in law and in Sumner's case the discovery of new evidence." ***Vaughn/Sumner***, Slip Op. p. 14. The change in law and the new evidence were not the only bases upon which the court below could have elected to dispose of these two cases. But Mrs. Vaughn and Mr. Sumner never had the opportunity to show that the administrative position of the agency which precipitated the appeal to the Veterans Court was not in accordance with law.

B. *Former Employees* and *Vaughn/Sumner* Undermine "Substantial Justification"

Mrs. Vaughn and Mr. Sumner interpret ***Former Employees*** and ***Vaughn/Sumner*** as requiring that the remand be the result of error committed by the agency. That negates the need for judicial consideration of the *second* prong of the EAJA statute. Under the test in ***Former Employees***, where a court does not retain jurisdiction but does remand to an administrative agency because of error by the agency, there are, in most cases, **no** circumstances in which the government's position at both the administrative or litigation level could possibly be "substantially justified": The finding of "prevailingess" necessarily presupposes a finding of error, and, in most cases, the error will not be "substantially justifiable." But now, under the present "prevailingness" analysis, an *applicant* (the plaintiff-appellant) must establish the error in the application and, in so doing, will necessarily shoulder what was formerly, under the statute, the government's burden, to be undertaken at the government's election.

Had the panel in ***Vaughn/Sumner*** correctly applied the criteria established by the Supreme Court in ***Schaefer***, Mrs. Vaughn and Mr. Sumner would have been "prevailing parties." Thereafter, under EAJA, the burden would have shifted to the government to elect whether to try to show that the agency's positions at the administrative and litigation level were substantially justified. The decision in this case pre-empts that statutory step, jumbles the concepts into the "prevailingness" analysis, and reassigns the burden.

C. The Trajectory of the Law Below.

Until ***Sumner*** the state of the law in the court below was stable: From its decision in ***Stillwell v. Brown,*** 6 Vet. App. 291 (1994), the court below had decided EAJA applications as if a remand alone were enough. Indeed, the court below confessed as much in its extensive treatment of ***Stillwell*** in ***Sumner*** at 15 Vet. App. 262-64. *See also* ***Vaughn***, 15 Vet. App. at 279. It then invented a new rule of law, a new prerequisite to "prevailingness": "[A] remand does not constitute 'some relief on the merits' unless that remand is *predicated on administrative error.*" ***Sumner***, 15 Vet. App. at 264. At that moment, the court below introduced two new terms and two corresponding new requirements not found in 28 U.S.C. § 2412: "predicatedness" and "administrative error." The trajectory of its EAJA jurisprudence was immediately jarred out of alignment with the statute and with ***Schaefer***, but that was not the end of the disruption.

Since ***Sumner*** the court below has invented more new prerequisites to "prevailingness." In ***Cycholl v. Principi***, "administrative error" morphed without explanation into "adjudicative error." 15 Vet. App. 355, 359 (2001) (twice). This Court has changed it in ***Former Employees*** to "alleged error," possibly a more generous standard but still a requirement not found in the statute. In ***McCormick v. Principi***, 16 Vet. App. 407 (2002), the court below announced that the error must be "recognized." Recently the court below added that the remand must not be a "***Maggitt***[2]-type remand" in ***Gordon v. Principi***, ___ Vet. App.

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[2] ***Maggitt v. West***, 202 F.3d 1370, 1377 (Fed. Cir. 2000). ***Maggitt*** permits the court below to remand a case to the Board to require the

(Continued on following page)

___, No. 99-0200(E) (decided August 8, 2003). In ***Halpern v. Principi***, ___ Vet.App. ___, No. 99-1472(E) (*per curiam* order decided August 15, 2003), the court below introduced the bar to the idea that "prevailingness," even though once conceded, can still be taken away! This proliferation of unnecessary and inappropriate qualifiers on "prevailingness" might now be stated in this way: The remand is not good enough – even though it is accompanied by a judgment by a court that never retains jurisdiction over a case on remand – unless it is a "non-***Maggitt***-type remand" based on recognized, but only alleged administrative, adjudicative error. With EAJA analysis now too much focused on "prevailingness," more such bright-line inventions are on their way. Indeed, the choice of this Court to decide ***Vaughn*** *and* ***Sumner*** without addressing the "administrative error" requirement is a license to the court below to continue to add such criteria to the statute.

While all those considerations are legitimate considerations in connection with an EAJA application, they should be considered on the election and insistence of the *government* as bearing whether its positions were "substantially justified," as the statute permits, not *sua sponte* by the court. The statutory analysis is elegant in its simplicity and gives each party a share of the burden and an opportunity to have its say. Instead, however, the court below mistakenly moved those factors to the "prevailingness" step of the analysis, apparently in a struggle to

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Board to consider in the first instance an argument first raised in the court below. Thus, the court below may remand where error is asserted but none is found, and such a remand is not regarded as sufficient to established "prevailingness."

make EAJA litigation rubber-stamp simple. That moves the burden, it corrupts the statutory scheme for resolution of EAJA applications, and the result is inconsistent with the Supreme Court decisions on "prevailingness."

CONCLUSION

Vaughn/Sumner adds a prerequisite (remand based on error) that is not contemplated by ***Schaefer*** (*any remand*, where the court does not retain jurisdiction is enough). ***Vaughn/Sumner*** is wrong because any remand from the Veterans Court, is enough, regardless of basis, to establish prevailing party status.

Mrs. Vaughn and Mr. Sumner, for the foregoing reasons, urge the Court to reconsider this matter *en banc* in light of the exceptional importance of the issues flowing from ***Vaughn/Sumner*** and ***Former Employees***.

Respectfully submitted,

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[Addendum Omitted In Printing]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 22nd day of August, 2003, addressed to:

Christian J. Moran
Attorney for Appellee
Commercial Litigation Branch
Department of Justice
Attn: Classification Unit – 8th Floor
1100 L Street, N.W.
Washington, D.C. 20530

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 00-1534

SYBLE M. VAUGHN, APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Chief Judge* and IVERS and STEINBERG, *Judges.*

ORDER

It is ORDERED that this Court's Order entered on November 9, 2001, is hereby amended as follows:

On page three in the fifth line of text from the bottom change "tests" to read "test".

DATED: November 19, 2001 FOR THE COURT:

/s/ Norman Y. Herring
Norman Y. Herring
Clerk of the Court

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 00-1534

SYBLE M. VAUGHN, APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Chief Judge* and IVERS and STEINBERG, *Judges.*

ORDER

Pending before the Court is the appellant's application, through counsel, for an award of attorney fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).

The appellant, the widow of veteran Ed M. Vaughn, sought review, through counsel, of a June 2, 2000, decision of the Board of Veterans' Appeals (Board or BVA) that, inter alia, had denied Department of Veterans Affairs service connection for the cause of the veteran's death. On November 30, 2000, the parties, citing the need for readjudication in light of the enactment, after the June 2000 Board decision, of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (VCAA), filed a joint motion for remand of that service-connected-death claim and further moved for dismissal of the remaining issues. The Court, via an order of the Clerk of the Court, granted this motion on December 15, 2000. On January 4, 2001, the appellant filed an EAJA application, seeking $1,270.03 in attorney fees and expenses. On April 6, 2001, the Secretary filed a response in opposition to the appellant's application. The Secretary argues that the appellant is not a prevailing party and, alternatively, that the Secretary's position at both the administrative and litigation stages of the proceedings was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A). On April 19, 2001, the appellant filed a reply to the Secretary's response; the appellant asserts both that she was a prevailing party (under both the so-called "merits" theory and the so-called "inevitable victory" theory) and that the Secretary's position was not substantially justified at the administrative level.

On May 29, 2001, the United States Supreme Court issued an opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 121 S. Ct. 1835 (2001). In that opinion, the U.S. Supreme Court held that the so-called " 'catalyst theory' [was] not a permissible basis" for the award of attorney fees under the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12205. *Buckhannon*, 121 S. Ct. at 1843. The U.S. Supreme Court also reviewed and reiterated its prior precedents defining the term "prevailing party" for purposes of several fee-shifting statutes. *Id.* at 1839-40. On July 12, 2001, this Court ordered supplemental briefing from the parties on the issue of the applicability and effect of *Buckhannon, supra. Vaughn v. Principi*, 15 Vet.App. 119 (2001) (per curiam order). The appellant filed a supplemental brief on August 2, 2001, and the Secretary filed a response on September 4, 2001. The appellant argues, inter alia, that she is a prevailing party under both the catalyst theory and the merits theory because she received a remand of her claim. The Secretary argues that the appellant is not a prevailing party under the catalyst theory, the merits theory, or the inevitable-victory theory.

In *Thayer v. Principi*, this Court recently concluded that "the definition of 'prevailing party' set forth by the Supreme Court's opinion in *Buckhannon*" applies to our consideration of fee applications under the EAJA. *Thayer*, ___ Vet.App. ___, ___, No. 98-1782, 2001 WL 1002743 (Sept. 4, 2001). Therefore, "the catalyst theory is no longer available to achieve prevailing-party status in this Court" under the EAJA. *Ibid.* Hence, we reject the appellant's contention that she is a prevailing party in this case under the catalyst theory, as described in *Thayer, supra*.

In *Sumner v. Principi*, the en banc Court has just issued an opinion denying an EAJA application filed in a case where the appellant had received a remand pursuant to *Cerullo v. Derwinski*, 1 Vet.App. 195 (1991), i.e., a remand to allow the BVA Chairman to grant BVA reconsideration. *Sumner*, ___ Vet.App. ___, ___, No. 99-368, slip op. at 12 (Nov. 6, 2001). The Court concluded, as to the merits theory for attaining prevailing-party status, that "those Supreme Court cases awarding prevailing-party status either require the ultimate receipt of a benefit that was sought in brining the litigation, i.e., the award of a benefit, or, at a minimum, a court remand predicated upon administrative error." *Id.* at ___, slip op. at 11 (citing *Buckhannon, supra,* and *Shalala v. Schaefer*, 509 U.S. 292 (1993)). The Court went on to deny prevailing-party status there on the grounds that "a remand does not constitute 'some relief on the merits' unless that remand is predicated upon administrative error", and that the appellant there had failed to demonstrate prevailing-party status under that "merits" test because "[n]owhere is his motion did the Secretary acknowledge error, and because, alternatively, in remanding the matter the Court did not recognize administrative error." *Ibid.*

The joint motion for remand in this case requested a remand "due to the recent enactment of the [VCAA]". November 30, 2000, Joint Motion for Remand, at 2. The December 15, 2000, order of the Clerk of the Court granted the motion and thus ordered a remand on this same ground. Given that the sole basis for the remand was the enactment of the VCAA and that the Board's disposition of this case had occurred *before* the enactment of the VCAA, there could not have been any Board error with respect to the VCAA. Therefore, under the rationale and test

enunciated in *Sumner*, the Court rejects the appellant's arguments here that she has attained prevailing-party status under the merits theory, due merely to her having received a remand in this case. *See Sumner*, ___ Vet.App. at ___, slip op. at 8-9 (explaining that, although *Stillwell v. Brown*, 6 Vet.App. 291, 299-300 (1994), could be read to mean that "a remand alone" conferred prevailing-party status upon appellant, *Stillwell* remand was in fact based on BVA error).

Finally, the appellant argues that she has obtained prevailing-party status under the inevitable-victory test. The inevitable-victory test has been raised to the Court, but we have never accepted it. *See, e.g., Lematta v. Brown*, 8 Vet.App. 504, 510 (1996) (citing *Perket v. Secretary of Health & Human Services*, 905 F.2d 129, 132 (6th Cir. 1990), and holding that test inapplicable where there had been no superseding legislation); *Chandler v. Gober*, 11 Vet.App. 6, 8 (1997) (holding that test was not applicable where "victory has neither been attained nor assured"), *overruled in part by Miley v. Principi*, 242 F.3d 1050, 1054 (Fed. Cir. 2001). Where a court has remanded a case at the merits stage based solely on a statutory change, the inevitable-victory test would allow for prevailing-party status where the appellant later, at the EAJA stage, could prove that he would have prevailed at the merits stage absent that statutory change. *See Perket*, 905 F.2d at 133; *see also Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994); *Guglietti v. Secretary of Health & Human Services*, 900 F.2d 397, 402 (1st Cir. 1990). However, under *Buckhannon*, 121 S. Ct. at 1840, and *Sumner*, ___ Vet.App. at ___, slip op. at 11-12, that test can no longer be viable because it lacks the critical requirement that a remand at the merits stage be predicated on administrative error.

Accordingly, we hold that the inevitable-victory test, just as the catalyst test, is not a permissible basis for establishing prevailing-party status under the EAJA. *See Buckhannon, Sumner*, and *Thayer*, all *supra*.

Hence, we hold that *Buckhannon*, as applied to this Court by *Sumner* and *Thayer*, both *supra*, precludes the appellant from achieving prevailing-party status under the merits, catalyst, or inevitable-victory tests based on obtaining a remand solely for readjudication in light of the enactment of the VCAA and will deny her EAJA application. *See Sumner*, ___ Vet.App. at ___, slip op. at 12 (denying EAJA application for failure to demonstrate prevailing-party status).

Upon consideration of the foregoing, it is

ORDERED that the appellant's application for EAJA fees and expenses is DENIED.

PER CURIAM.

DATED: NOV - 9 2001

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 99-368

W.T. SUMNER, APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellant's Motion for Full Court Decision

(Argued October 3, 2001 Decided NOV - 6 2001)

Clayte Binion, of Fort Worth, Texas, was on the pleadings for the appellant.

Michele R. Katina, with whom *Tim S. McClain*, General Counsel; *Ron Garvin*, Assistant General Counsel; *Darryl A. Joe*, Acting Deputy Assistant General Counsel; and *Allyn L. Engelstein*, all of Washington, D.C., were on the pleadings, for the appellee.

Kenneth M. Carpenter, of Topeka, Kansas, for the appellant and for the National Organization of Veterans' Advocates as amicus curiae.

Before KRAMER, *Chief Judge*, and FARLEY, HOLDAWAY, IVERS STEINBERG, and GREENE, *Judges*.

KRAMER, *Chief Judge*: Presently before the Court is the appellant's application for attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA). For the reasons that follow, the Court will revoke the single-judge order previously issued in this case; will issue this opinion in its stead; and will deny the appellant's EAJA application.

I. BACKGROUND

The appellant, through counsel, filed with this Court a timely Notice of Appeal (NOA) from a January 20, 1999, Board of Veterans' Appeals (Board or BVA) decision that had denied his claim for service connection for spinal meningitis. Subsequent to filing his NOA with the Court, the appellant filed an unopposed motion for a stay of proceedings in his appeal; he notified the Court that he had filed with the Board a motion for reconsideration (premised upon the discovery of new and material evidence in the form of relevant records or reports of the service department concerned) of the January 1999 BVA decision and requested that the Court stay proceedings in his case until he received notification from the Board Chairman whether the Chairman was inclined to grant reconsideration. In November 1999, the Court ordered, inter alia, that if the Board Chairman was inclined to grant reconsideration of the January 1999 Board decision, the Secretary was to file with the Court a motion for remand. *See Cerullo v. Derwinski,* 1 Vet.App. 195, 200 (1991).

On February 4, 2000, pursuant to the Court's order, the Secretary filed an unopposed motion to remand the January 1999 Board decision pursuant to *Cerullo, supra.* In that motion, the Secretary indicated that the BVA had notified the appellant that the BVA Chairman was inclined to grant reconsideration of the January 1999 Board decision and that the Board would take no further action with regard to reconsideration pending this Court's transfer of jurisdiction over the appeal from the Court to the Board. The Secretary thus requested that the Court "remand . . . to allow the BVA to vacate its decision and to readjudicate [the a]ppellant's claim." Motion at 1. Accordingly, the Court, on

February 10, 2000, granted the Secretary's unopposed motion for remand pursuant to *Cerullo, supra,* and ordered the immediate issuance of mandate.

The appellant, on March 11, 2000, filed his application for an award of attorney fees and expenses under the EAJA, seeking $6,444.66 in fees and expenses. The appellant asserted that he was a prevailing party for purposes of an award of EAJA fees, inter alia, because, by obtaining a remand of his claim, he had achieved success "on the merits." Application (Appl.) at 2. In the alternative, the appellant asserted that he was a prevailing party under the catalyst theory. *Id.* The appellant further asserted that: the position of the Secretary at the administrative level was not substantially justified; there were no special circumstances that would make an award of EAJA fees unjust; and his net worth did not exceed $2,000,000. Appl. at 3-4. The Secretary, on May 15, 2000, filed a response in opposition to the appellant's EAJA application. In that response, the Secretary asserted that the appellant was not a prevailing party under the EAJA because the *Cerullo* remand that was granted in his appeal did not reflect that the appellant had succeeded in "any demonstrable manner on the merits." Response (Resp.) at 5. In addition, the Secretary argued that the appellant had failed to show that his appeal was the catalyst that had prompted the BVA to grant reconsideration and that the appellant thus was not a prevailing party under the catalyst theory. Resp. at 6-7. The Secretary further asserted that his position at the administrative level was substantially justified. Resp. at 9-10. The Secretary requested, therefore, that the Court deny the appellant's EAJA application. Resp. at 10. The appellant subsequently filed a reply to the Secretary's

response; he in essence reiterated the assertions that he had made in his EAJA application.

In an August 9, 2000, single-judge order, the Court dismissed the appellant's EAJA application for lack of jurisdiction. In that order, the Court found that the appellant was not a prevailing party for purposes of an award of EAJA fees because, under this Court's decision in *Lematta v. Brown,* 8 Vet.App. 504, 507 (1996), "a *Cerullo* remand for reconsideration by the Board, prior to the Court's review of the record on appeal or the filing of briefs, does not confer prevailing-party status upon an appellant pursuant to a merits theory." *Sumner v. Gober,* U.S. Vet.App. No. 99-368 (ord. Aug. 9, 2000). The Court also stated that, even assuming that the appellant was a prevailing party, the position of the Secretary at both the administrative and the litigation stages was substantially justified. *Id.* at 3.

Subsequent to the Court's August 9, 2000, dismissal of his EAJA application, the appellant filed a timely motion for panel review and for panel referral to the full Court for a decision. In that motion, the appellant argued, inter alia, that, pursuant to *Shalala v. Schaefer,* 509 U.S. 292 (1993), and *Stillwell v. Brown,* 6 Vet.App. 291 (1994), he was a prevailing party because the Court's February 2000 remand of his appeal qualified as success on the merits. Finally, the appellant requested that the en banc Court reconsider and overrule *Lematta* because it was inconsistent with *Schaefer* and *Stillwell,* both *supra.* In a September 29, 2000, order, the Court denied the appellant's motion for a panel decision and denied as premature the appellant's motion for a full Court decision. *See* U.S. VET. APP. R. 35(c) (motion for full Court decision may be filed

after panel has denied motion for panel decision or motion for panel reconsideration).

On October 17, 2000, the appellant filed a motion for panel reconsideration or, in the alternative, for a full Court decision. The appellant in essence reiterated the arguments that he had made previously regarding *Lematta* and further stated that *Lematta* was in conflict with this Court's decision in *Swiney v. Gober,* 14 Vet.App. 65, 69 (2000) (stating that "all of the appealed claims were remanded, resolutions which materially changed the 'legal relationship' between the Secretary and the appellant, *Texas State Teachers Ass'n* [*v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792-93 (1989)], from one of claim denial to a continuing adjudicatory process"). The Court, in an April 3, 2001, order, denied the appellant's motion for panel reconsideration. *Sumner v. Principi,* 14 Vet.App. 309, 310 (2001) (en banc order). In its order, the Court stated that the resolution of *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.,* 121 S. Ct. 1835 (2001), may affect the disposition of the appellant's EAJA application. The Court ordered, therefore, that the appellant's motion for a full Court decision be held in abeyance pending further order of the Court. *Sumner, supra.* The Court further ordered that the appellant, within 30 days after the U.S. Supreme Court's disposition of *Buckhannon, supra,* file and serve a legal memorandum addressing the resolution of that proceeding as it pertains to his EAJA application. *Sumner, supra.* Finally, the Court ordered that the Secretary file and serve a legal memorandum within 30 days after service of the appellant's legal memorandum. *Id.* The U.S. Supreme Court, on May 29, 2001, issued its opinion in *Buckhannon,* 121 S. Ct. 1835.

The National Organization of Veterans' Advocates (NOVA), on June 27, 2001, filed an unopposed motion for leave to file an amicus curiae brief. On that same date, the Court received NOVA's brief. NOVA asserts that, to attain prevailing-party status, *Buckhannon,* 121 S. Ct. at 1839-40, requires that the appellant receive "at least some relief on the merits" from the Court. Brief (Br.) at 5. NOVA argues that the appellant received "relief on the merits of his claim" because the Court "vacated" the January 20, 1999, BVA decision and remanded the matter to the Board for readjudication. Br. at 6. (The Court notes that, contrary to NOVA's argument, the Court did not vacate the BVA decision, but that circumstance is not relevant under our analysis of prevailing-party status. *See* discussion, *infra.*) NOVA further argues that such a remand effects a "material alteration of the legal relationship of the parties" because, as stated in *Swiney,* the appellant's case has gone from "[claim] denial to a continuing adjudicatory process." Br. at 6-7. Finally, NOVA argues that *Lematta* is inconsistent with *Buckhannon* because *Lematta* requires the appellant to "win the litigation." Br. at 8. NOVA contends, therefore, that the full Court should overrule *Lematta* and reverse the August 9, 2000, single-judge order that dismissed the appellant's EAJA application. *Id.*

On June 28, 2001, the appellant, pursuant to the Court's April 2001 order, filed his legal memorandum. The appellant contends that *Buckhannon* and *Swiney* together establish that the Court's *Cerullo* remand in the instant case is an enforceable judgment on the merits because, in remanding the matter and requiring readjudication, the Court's order altered the legal relationship between the appellant and the Secretary in that it allowed the appellant to avoid an adverse Court decision and to reassert his

claim before the BVA. Appellant's Memorandum (Mem.) at 9-10. The appellant asserts: "It is assumed that the Court reviewed the underlying pleadings and the record and determined there was no legal impediment preventing the Court from granting the Secretary's [unopposed] motion [for] remand." Appellant's Mem. at 11. The appellant contends, therefore, that the Court's remand order addressed the merits of his case and that he thus is a prevailing party for purposes of an award of attorney fees and expenses under the EAJA. *Id.*

The appellant next asserts that all that *Buckhannon* requires to attain prevailing-party status under the success-on-the-merits theory is an enforceable judgment on the merits and that a *Cerullo* remand meets this requirement. Appellant's Mem. at 12. The appellant contends in essence that *Lematta* predicated success on the merits upon the filing of pleadings or other documents after the appellant has filed his NOA with the Court and that, because "success on the merits under *Buckhannon* was not predicated on the filing of pleadings or other documents by the appellant subsequent to the filing of the appeal, *Buckhannon* effectively overrules *Lematta*." Appellant's Mem. at 12-13. In addition, the appellant asserts that the catalyst theory is a moot issue because he prevails under the success-on-the-merits theory. *Id.* Finally, the appellant reiterates his assertion that the Secretary's position was not substantially justified at the administrative level. *Id.* The appellant states that, on May 31, 2001, a VA regional office (RO), subsequent to the BVA's granting reconsideration and remanding his claim to the RO, granted service connection for post-meningitis headaches and assigned a 10% rating, effective April 11, 1995. Appellant's Mem. at 14 (Appendix II). The appellant

requests that the Court overrule *Lematta*; find that he is a prevailing party under the EAJA and that the Secretary was not substantially justified at the administrative level; and grant his application for an award of attorney fees and expenses under the EAJA.

On July 27, 2001, pursuant to the Court's April 2001 order, the Secretary filed his legal memorandum. The Secretary initially asserts that *Buckhannon* eliminates the catalyst theory as a viable basis for attaining prevailing-party status. Secretary's Mem. at 4-5. The Secretary then asserts that the Supreme Court's application of the merits theory set forth in *Buckhannon* is not inconsistent with this Court's application of the merits theory in *Lematta,* and that *Buckhannon* thus does not overrule *Lematta.* Secretary's Mem. at 5. The Secretary argues that the appellant's contention that under *Buckhannon* an appellant is a prevailing party for purposes of the EAJA by merely obtaining a Court remand judgment in the underlying case, thus altering the legal relationship of the parties, ignores the key element in *Buckhannon* that there must be a judicial judgment *on the merits.* Secretary's Mem. at 6. The Secretary contends that the *Cerullo* remand that was granted by this Court in the underlying case was purely procedural and did not afford the appellant even "some relief on the merits of his claim." Secretary's Mem. at 6-7. The Secretary asserts that this Court did not make "'some ['substantive determination in [the] appeal, based upon the record, the parties' pleadings, and the Court's[']] precedent, that is favorable to the appellant.'" *Id.* (quoting *Swiney,* 14 Vet.App. at 69). The Secretary thus contends that the appellant did not achieve success "as a result of the Court's consideration of the merits of his arguments" and, therefore, is not a prevailing

party under the merits theory for purposes of the EAJA. *Id.* at 7.

Oral argument before the en banc Court was held in the instant case on October 3, 2001. By holding that oral argument, the Court in essence granted the appellant's motion for a full Court decision and also granted NOVA's motion to appear as amicus curiae. NOVA's brief will be filed as of the date that it was received.

II. ANALYSIS

This Court may award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). In order for the Court to have jurisdiction over an EAJA application it must be filed within the 30-day period set forth in 28 U.S.C. § 2412(d)(1)(B). In order for the appellant to be eligible for an EAJA award, his application must contain: (1) a showing that the applicant is a prevailing party within the meaning of the EAJA; (2) an assertion that the applicant is a party eligible for an award under the EAJA because his or her net worth does not exceed $2,000,000 dollars; (3) an allegation that the position of the Secretary at the administrative level or in litigation was not substantially justified; and (4) an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d); *Cullens v. Gober,* 14 Vet.App. 234, 237 (2001) (en banc); *Chesser v. West,* 11 Vet.App. 497, 499 (1998); *Bazalo v. Brown,* 9 Vet.App. 304, 308 (1996) (en banc), *rev'd on other grounds sub nom. Bazalo v. West,* 150 F.3d 1380, 1384 (Fed. Cir. 1998). The pivotal issue in the instant case is whether the appellant has shown that he is a prevailing party for purposes of an award of attorney fees and expenses under the EAJA.

To the extent that the appellant still may be asserting prevailing-party status based upon the argument that his appeal of the January 1999 Board decision to this Court served as the catalyst for the BVA Chairman's decision to grant reconsideration of his claim, as a result of *Buckhannon* that issue has been eliminated from the instant case. *See Thayer v. Principi*, ___ Vet.App. ___, ___, (2001) WL 1002743 at *7, No. 98-1782 (Sept. 4, 2001) (concluding that *Buckhannon* prevailing-party definition should be applied to EAJA and that catalyst theory is not available to achieve prevailing-party status in this Court). Although the holding of *Buckhannon* involved only the elimination of the catalyst theory as a basis for achieving prevailing-party status, the language that the Supreme Court used in restating its precedents with respect to the definition of prevailing party prompts this Court now to reexamine our jurisprudence with regard to attaining prevailing-party status pursuant to the success-on-the-merits theory under the EAJA and to clarify our caselaw.

In *Buckhannon,* the Supreme Court initially noted the definition of "prevailing party" in fee-shifting statutes as being one " 'in whose favor a judgment is rendered, regardless of the amount of damages awarded.' " *Buckhannon,* 121 S. Ct. at 1839 (quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)). The Supreme Court then stated that the view that a prevailing party is "one who has been awarded some relief by the court can be distilled from our prior cases." *Id.* In discussing such prior cases, the Supreme Court reiterated that, in order to attain prevailing-party status, a party is required to " 'receive at least some relief on the merits of his claim.' " *Id.* at 1840 (quoting *Hewitt v. Helms,* 482 U.S. 755, 760 (1987) (holding that plaintiff was not prevailing party simply by virtue of court of appeals

favorable statement of law because such statement, which amounted at most to interlocutory ruling that complaint should not have been dismissed for failure to state constitutional claim but which afforded plaintiff no relief on merits of that claim, was "not the stuff of which legal victories are made")). The Supreme Court found that, when taken together, its prior decisions established that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 1840 (quoting *Texas State Teachers Ass'n,* 489 U.S. at 792 (holding that unions were prevailing parties because they obtained judgment finding that school-district policy prohibiting teachers from communicating with each other regarding union activities violated teachers' First Amendment rights)); *see also Farrar v. Hobby,* 506 U.S. 103, 109-12 (1992) (Supreme Court held that plaintiff who had been awarded even nominal damages obtained enforceable judgment that reflected relief on merits of claim and thus made him prevailing party for fee purposes); *Maher v. Gagne,* 448 U.S. 122, 125 (1980) (Supreme Court affirmed lower court judgment that Aid to Families with Dependent Children (AFDC) plaintiff was prevailing party where she had sought, inter alia, and obtained consent decree awarding substantial increase in standard allowance for work-related expenses and right to prove actual work-related expenses exceeded standard allowance). The Supreme Court stressed that the "merit[s]" requirement contained in its prior cases was not to be abrogated because " 'only when a party has prevailed on the merits of at least some of his claims . . . has there been a determination of the 'substantial rights of the parties'.' " *Buckhannon,* 121 S. Ct. at 1841-42 (quoting *Hanrahan v. Hampton,* 446 U.S. 754, 758 (1980) (per

curiam) (holding that plaintiffs were not prevailing parties because reversal of directed verdict against plaintiffs did not involve any finding on merits of their underlying claims)).

The Court's seminal decision on prevailing-party status is *Stillwell, supra.* In the appeal underlying *Stillwell,* this Court granted the parties' joint motion for remand pursuant to *Gregory v. Brown,* 5 Vet.App. 108 (1993) (remand ordered for Board to correct error made in applying regulation, subsequently found to be unlawful, regarding surviving-spouse status; Court also ordered BVA to make specific factual findings in course of readjudication). In rendering a decision on the appellant's EAJA application in *Stillwell,* the Court, relying upon *Schaefer, supra,* held that the appellant was a prevailing party because she had obtained just such a remand, i.e., a remand predicated upon the BVA's application of an invalid regulation, even though the Court had not yet declared (in *Gregory, supra*) that invalidity at the time that the Board had rendered its decision on her claim. *Stillwell,* 6 Vet.App. at 300-01. The Court further held, however, that the Secretary was substantially justified because his misinterpretation of the regulation at issue was "no more than a reasonable mistake" and thus denied the appellant's EAJA application. *Id.* at 301-03. In the course of reaching its decision in *Stillwell,* the Court stated that *Schaefer* directed that "a remand alone" conferred prevailing-party status upon an appellant because a remand represented "'succe[ss] on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.'" *Stillwell,* 6 Vet.App. at 299-300 (quoting *Schaefer,* 509 U.S. at 302).

In the underlying case in *Schaefer,* the plaintiff had been denied Social Security disability benefits at the administrative level and subsequently had sought judicial review of that denial. *See Schaefer,* 509 U.S. at 294. In the course of that judicial review, a district court, holding that, in adjudicating the plaintiff's claim at the administrative level, the Secretary of Health and Human Services (HHS) had committed three errors that the Secretary had to correct, reversed the negative administrative decision and remanded the plaintiff's claim for disability benefits for correction of those errors. *Id.* Thereafter, when rendering a decision on the plaintiff's EAJA application in *Schaefer,* the Supreme Court held that the plaintiff was a prevailing party for EAJA purposes based upon this underlying result. *Id.* at 301-02. Relying primarily upon the district court's recognition of administrative errors, the entry of judgment, and the sequential obligation of the Secretary of HHS to correct such errors, the Supreme Court held that the plaintiff was a prevailing party for EAJA purposes because he "certainly [met the] description [of a prevailing party as one who] 'has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.'" *Id.* (quoting *Texas State Teachers Ass'n,* 489 U.S. at 791-92).

The Court notes in particular that the remands in both *Schaefer* and *Stillwell* were predicated upon administrative error. Although the Court recognizes the breadth of the language in *Stillwell, supra,* which, in and of itself, could be read to mean that prevailing-party status is achieved any time that this Court remands an appellant's underlying appeal, that language must be read in the context of why the remands were ordered in both *Schaefer* and *Stillwell.*

In *Lematta,* which the appellant and NOVA urge this Court to find inconsistent with *Buckhannon* and thus overrule, the Court addressed for the first time whether a remand pursuant to *Cerullo* automatically makes an appellant a prevailing party under the EAJA. The Court initially stated that "this Court has generally held that the prevailing[-]party requirement of the EAJA is satisfied when a remand is ordered." *Lematta,* 8 Vet.App. at 507 (citing *Stillwell, supra*). In the context of applying the success-on-the-merits theory for attaining prevailing-party status, the Court posited that, at its most fundamental level, that theory would allow an appellant to qualify as a prevailing party if the appellant "'w[on] the litigation.'" *Id.* at 508 (quoting *Exeter-West Greenwich Reg'l Sch. Dist. v. Pontarelli,* 788 F.2d 47, 50 (1st Cir. 1986)). The Court stated, however, that, pursuant to *Stillwell,* an "outright victory" is not always necessary and that it is sufficient for the Court to make some "'substantive determination in [the] appeal, based upon the record, the parties' pleadings, and the Court's' precedent, that is favorable to the appellant." *Id.* (quoting *Stillwell,* 6 Vet.App. at 301). The Court found the rule quoted in *Stillwell* to be consistent with the Supreme Court's holding in *Schaefer* that a party to a lawsuit attains prevailing-party status "'[i]f the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit . . . sought in bringing the suit.'" *Id.* (quoting *Schaefer,* 509 U.S. at 302). Applying these guidelines, the Court in *Lematta* held that, because its *Cerullo* remand order was issued before it had considered the merits of the appellant's case, it had not made any substantive determinations with regard to the appellant's appeal and that thus the appellant had failed to demonstrate that he was a prevailing party under the merits theory for purposes of the EAJA. *Id.* at 509.

Lematta also must be construed in the context in which it occurred. In the appeal underlying *Lematta,* the Court, unlike the district court in *Schaefer* and this Court in *Stillwell,* did not order a remand predicated upon error in the administrative adjudication process. Rather, in that underlying appeal in *Lematta,* the Court had based its remand of the appellant's claim solely upon the Secretary's remand motion, which requested that the Court return jurisdiction to the Board but which did not acknowledge any administrative error. *Lematta's* reference to the filing of a record on appeal or any pleadings by the parties was simply a case-specific reference to demonstrate that the Court had made no remand based upon administrative error. Thus, given this context, the *Lematta* holding is not inconsistent with either the *Schaefer* or *Stillwell* holdings.

The appellant similarly argues that *Lematta* is inconsistent with *Swiney, supra.* In the underlying appeal in *Swiney,* the Court reversed a Board decision as to one claim; vacated a Board decision as two other claims on the grounds that the Board "had failed to apply and had incorrectly applied, respectively, pertinent regulations"; and remanded the three matters for readjudication. *Swiney,* 14 Vet.App. at 68. In the course of rendering a decision on the appellant's EAJA application in *Swiney,* the Court stated that prevailing-party status is generally attained when an appellant obtains a remand of his claim because the remand " 'represents succe[ss] on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.' " *Id.* at 69 (quoting *Stillwell* and noting that *Stillwell* cited *Schaefer*). The Court further stated that " '[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress

sought to promote in the fee statute.'" *Id.* (emphasis in *Swiney* omitted) (quoting *Texas State Teachers Ass'n, supra*). In finding that the appellant in *Swiney* was a prevailing party for EAJA purposes, the Court posited, inter alia, that the remands in the underlying case were "resolutions which materially changed the 'legal relationship' between the Secretary and the appellant, *Texas State Teachers Ass'n, supra,* from one of claim denial to a continuing adjudicatory process." *Swiney,* 14 Vet.App. at 69. *Swiney* also must be construed within its context, i.e., a Court remand predicated upon administrative error. It is a remand such as that ordered in *Swiney* and in *Schaefer,* as well as the other resolutions in the Supreme Court cases cited above, that result in a material alteration of the legal relationship of the parties. Thus, contrary to the appellant's argument, *Lematta* and *Swiney* are not inconsistent because in *Lematta,* unlike in *Swiney,* there was not a remand predicated upon administrative error.

The Court notes that in *Buckhannon, supra,* where prevailing-party status was not found, there was no underlying court determination of any error. Further, an analysis of the cases cited in *Buckhannon* is instructive. Applying the standard summarized in *Buckhannon* ("some relief on the merits"), 121 S. Ct. at 1840-42, prevailing-party status was found by the Supreme Court in the following situations: where the plaintiff had obtained an enforceable judgment for damages, *Farrar, supra;* a judgment, based upon a court finding of a constitutional violation, that altered a school-district prohibition on teacher communication regarding union activities, *Texas State Teachers Ass'n, supra;* and a consent decree that provided an AFDC recipient with a substantial increase in the standard allowance for work-related expenses and a

right to prove that actual work-related expenses exceeded the standard allowance, *Maher, supra.* Conversely, prevailing-party status was not found, under the test reiterated in *Buckhannon,* where the plaintiff merely obtained a favorable statement of law, *Hewitt, supra,* or a reversal of a directed verdict against him, *Hanrahan, supra.*

This analysis reveals that those Supreme Court cases awarding prevailing-party status either require the ultimate receipt of a benefit that was sought in bringing the litigation, i.e., the award of a benefit, or, at a minimum, a court remand predicated upon administrative error. *See Buckhannon* and *Schaefer,* both *supra.* Both of these alternatives entail resolutions that materially alter the legal relationship of the parties. *See Texas State Teachers Ass'n* and *Swiney,* both *supra.* Thus, a remand does not constitute "some relief on the merits" unless that remand is predicated upon administrative error. *Buckhannon,* 121 S. Ct. at 1840. *Stillwell, Lematta,* and *Swiney,* all *supra,* comport with this construct. To the extent that any Court precedent could be construed as in conflict with our holding today, we disavow that precedent.

That standard has not been met in the instant case. The appellant's claim was remanded as requested in the Secretary's unopposed motion for remand. Because nowhere in his motion did the Secretary acknowledge error, and because, alternatively, in remanding the matter, the Court did not recognize administrative error, the remand was not predicated upon administrative error. The appellant thus is not a prevailing party. Accordingly, the Court denies the appellant's EAJA application.

III. CONCLUSION

Upon consideration of the foregoing analysis, the August 9, 2000, single-judge order is revoked; this opinion is issued in its stead; and the appellant's EAJA application is denied. It is so ordered.